STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 11, 2005
V	No. 250805 Oakland Circuit Court
CARL WALTER HEICHEL, Defendant-Appellant.	LC No. 02-187701-FC

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Defendant, originally charged with open murder, MCL 750.316, was convicted by a jury of second-degree murder, MCL 750.317. He was sentenced as a fourth habitual offender to life imprisonment. MCL 769.12. Defendant appeals as of right. We affirm.

I

Defendant's conviction arose from an incident occurring on June 4, 2002. The victim, Dereck Flesher, and defendant were at the victim's apartment, drinking and smoking crack cocaine. An argument ensued and defendant stabbed the victim eight times with a knife, causing fatal injuries. After turning himself in, defendant gave a statement to the police, indicating he was at fault for the victim's death; however, defendant claimed he acted in self-defense. According to defendant, he and the victim were long-time friends. They had been drinking at a local bar when they returned to the victim's apartment to smoke crack cocaine. He and the victim started to argue and suddenly, without provocation, the victim, suspecting defendant had taken more than his allotted share of the cocaine, grabbed defendant around the neck. Defendant stated the victim grabbed a knife, and when defendant attempted to pull the knife away, the victim was stabbed. Defendant could not remember how many times he stabbed the victim. Defendant checked the victim's pulse and panicked. Defendant left the murder weapon in the apartment and drove the victim's van to a motel. An unidentified woman whom defendant had just met paid for the motel room. Defendant telephoned "Devon," his drug dealer, to purchase additional crack cocaine for himself and the unidentified woman. Eventually, defendant telephoned his wife, mother and father informing them that he intended to turn himself in to the police because thought he killed the victim. Defendant stayed in the motel room all day and did not leave until he was picked up by his sister, mother, and father. In the course of the interview, defendant informed the police that he was sober, had not slept for two days, was depressed, did not want to live, and had previously attempted to commit suicide.

Defendant filed a pretrial motion to suppress his police statement as involuntary, asserting that he did not knowingly or intelligently waive his constitutional rights because he was emotionally distraught and under the influence of alcohol and controlled substances when he gave the statement. At the *Walker* hearing,[1] the trial court heard testimony from the interrogating police officers and defendant's family members. In addition, a videotape recording of defendant's statement was introduced into evidence. At the conclusion of the hearing, the trial court denied the suppression motion, concluding that under the totality of the circumstances, defendant's statements were made knowingly, voluntarily and intelligently. After a four-day jury trial, defendant was convicted of second-degree murder, this appeal ensued.

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

II

A trial court's findings of fact regarding a motion to suppress are reviewed for clear error. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001); *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002). Questions of law relevant to a motion to suppress, including issues involving the voluntariness of a defendant's statement are reviewed de novo. *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994).

This Court reviews for an abuse of discretion whether a jury instruction is applicable to the facts of a case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). Jury instructions are reviewed in their entirety to determine whether error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.*

"Appellate review of sentencing decisions by the trial court is limited to determining whether an abuse of discretion has occurred." *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992).

III

Defendant first asserts that the trial court erred by finding that he voluntarily waived his Fifth Amendment rights and admitting his custodial statements into evidence. We disagree. Under the Due Process Clauses of the Fifth and Fourteenth Amendments, in order for a confession to be admissible, the confession must have been made "freely, voluntarily, and without compulsion or inducement of any sort." *People v Daoud*, 462 Mich 621, 631; 614 NW2d 152 (2000)(citations omitted). An involuntary confession is inadmissible. *Id.* at 630.

As noted by our Supreme Court, the "voluntariness" element of a defendant's waiver of his or her *Miranda*[2] rights relates to whether the waiver was "voluntary in the sense that it was the product of free and deliberate choice rather than intimidation, coercion, or deception . . ." *Daoud, supra* at 635, quoting *Colorado v Connelly*, 479 US 157, 170; 107 S Ct 515; 93 L Ed 2d 473 (1986); see also *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997) (whether a statement was made voluntarily is generally determined by an examination of police conduct). Defendant maintains that, because of his mental health status and excessive cocaine abuse, his admission was not knowingly or intelligently given. Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *Id.*, citing *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). "While the voluntariness prong is determined solely by examining police conduct, a statement made pursuant to police questioning may be suppressed in the absence of police coercion if the defendant was incapable of knowingly and intelligently waiving his constitutional rights." *Howard, supra* at 538 (citation omitted). Whether a suspect has knowingly and intelligently

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

waived his *Miranda* rights depends in each case on the totality of the circumstances, including the defendant's intelligence and capacity to understand the warnings given. *Id.*

On our review of the record, we find no basis to disturb the trial court's determination that defendant's statement was voluntary or knowingly or intelligently given. The trial court found that defendant's statement was not compelled by police conduct, but, instead resulted from defendant's motivation to "get something off his chest" about the victims' death. The trial court did not find credible defendant's family's testimony that defendant smelled of alcohol when they transported him to the police station; noted that defendant was interviewed in an interview room rather than a jail cell; and concluded that despite defendant's family's testimony that defendant attempted to commit suicide by trying to jump out of the moving car while enroute to the police station to turn himself in, defendant had had sufficient time to calm down after his arrest and before being interviewed by police. The court also rejected defendant's claims that his *Miranda* rights were not given, waived, or understood in a meaningful sense, in part, because it found that the videotape evidence showed the police officers explaining defendant's rights, and that defendant expressed his understanding of his rights by initialing with a very legible signature, the *Miranda* waiver form. The trial court also found that the videotape showed that the police officers attempted to make defendant comfortable and provide him with food and water, and that while defendant appeared to be upset at times, he did not appear to be confused and his answers remained intact and on point.

As a general matter, unless we have a definite and firm conviction that a mistake has been made this Court will not interfere with the factfinder's role in determining the weight of evidence or the credibility of witnesses, whether the factfinder is a jury, or the trial court. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004) After review of the record, we are not left with a definite and firm conviction that a mistake has been made. *Davis*, *supra* at 362. Defendant has failed to show any error in the trial court's ruling that his statement was admissible as evidence.

II

Defendant next claims that the trial court committed reversible error by instructing the jury that defendant's state of mind could be inferred from the type of weapon used, the manner of the victim's death and from the circumstances surrounding the offense.[3] However, because

[3] The trial court instructed the jury, pursuant to, CJI2d.16.21, in relevant part, as follows:

> . . . . For the crime of first-degree murder, this means that the Prosecution must that the Defendant intended to kill [the victim]. The Defendant's intent may be proved by what he said, what he did, how he did it, or by any other facts and circumstances in evidence.
>
> You must think about all the evidence in deciding what the Defendant's state of mind was at the time of the alleged killing. The Defendant's state of mind may be inferred from the kind of weapon used, the types of wounds inflicted, the acts and words of the Defendant, an any other circumstances surrounding the

(continued…)

defendant affirmatively expressed satisfaction with the trial court's instructions as given, defendant has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).[4] Because defendant waived this right, there is no error to review. *Id.* at 219; *People v Hall*, 256 Mich App 674, 679; 671 NW2d 545 (2003).[5]

III

In defendant's final claim of error, he concedes his sentence of life imprisonment is within the sentencing guidelines, but nonetheless argues that he is entitled to resentencing because his sentence was disproportionate to his circumstances and those of this "tragic" and "unintended" offense. As this offense occurred after January 1, 1999, the legislative sentencing guidelines apply, MCL 769.31, *et seq*.; MCL 777.1, *et seq*. It is well established that a legislatively mandated sentence is appropriate. *People v Babcock*, 469 Mich 247, 263-264; 666 NW2d 231 (2003). Since the Legislature has addressed proportionality in establishing the statutory sentencing guidelines "the appropriate sentence range is determined by reference to the principle of proportionality".

We find "defendant's proportionality claim is outside the limited scope of review provided for by the statute." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Because defendant was sentenced within the guidelines range of 315 months to 1015 months (or life), and does not claim the trial court erred in scoring the guidelines or relied on inaccurate information, this Court must affirm. MCL 769.34(10).

Affirmed.

/s/ Michael J. Talbot
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder

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> alleged killing. You may infer that the Defendant intended to kill if he used a dangerous weapon in a way that was likely to cause death. Likewise, you may infer that the defendant intended to usual results that follow from the use of a dangerous weapon.

[4] We further decline to address the merits of defendant's one sentence argument that defense counsel was ineffective for failing to object to the instruction. This cursory argument is not properly preserved or presented for appellate review as defendant did not include the issue in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

[5] Moreover, were we to review the issue, we would nonetheless conclude defendant's rights to a fair trial were sufficiently protected. Reviewing the instructions in their entirety, the trial court's instruction did not misstate the law or exclude any material defenses as the trial court instructed the jury on defendant's theory of self-defense and involuntary manslaughter. More importantly, the state of mind jury instruction, CJI2d.16.21, pertained exclusively to the charge of first-degree murder, which is not the offense for which defendant was ultimately convicted.